Supreme Court, U.S.
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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

APPEAL NO. 97-1075

Kermie M. King

Plaintiff-Appellant

v.

Herbert J. Thomas Memorial Hospital Association

Defendant-Appellee

SUPPLEMENTAL APPENDIX

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28pp

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

KERMIE M. KING,

Plaintiff

V. Civil Action No. 2:95-0252

HERBERT J. THOMAS MEMORIAL
HOSPITAL ASSOCIATION, a
non-profit West Virginia corporation,

Defendant

MEMORANDUM ORDER

This matter is before the court on the motion for summary judgment filed by defendant Herbert J. Thomas Memorial Hospital Association on December 26, 1995.

The following facts are not in dispute.

Plaintiff was employed by defendant hospital as a dietary aid for approximately twenty-five years until she was terminated on September 9, 1987, at the age of 58. The termination was based on events which occurred on August 27, 1987. On that date, a fellow employee, Dee Bartoe, reported that plaintiff left the department at 2:20 p.m. and was observed getting into a vehicle and leaving the hospital grounds at 2:26 p.m. with her husband. (Pl.'s Exs. 6 & 7.) Plaintiff was scheduled to work until 2:30 p.m. and, on her time card, signed out at 2:30 p.m.

(Pl.'s Ex. 8.) In a handwritten report dated September 9, 1987, and signed by Darlene Kestner and Dee Bartoe, it is stated that plaintiff was counseled on September 8, 1987, and "admitted to leaving the department early." (Pl.'s Ex. 7.) The report further states that plaintiff "also admitted to this (leaving early) on other occasions." (Id.)

Initially, plaintiff was warned on September 8, 1987, by Darlene Kestner, her immediate supervisor, and Margaret Eagloski, the department head, that any further occurrences would result in a three-day suspension and a requirement that she check with the supervisor on duty when signing out. (Pl.'s Ex. 6 & 7.) However, on September 9, 1987, defendant's personnel director, Donna Arbogast, talked with plaintiff about the discrepancy between the time written on her time card and the time she ceased work. Plaintiff admitted that she had left earlier than her time card indicated and had also done so on prior occasions. (Def.'s Ex. 4.) By way of explanation, she stated that she did so because she felt that others had done the same thing. (Def.'s Ex. 4.) Arbogast then converted the warning to a discharge on the basis of a provision in the employee handbook stating that the first offense of falsification of a time card would result in discharge. (Pl.'s Ex. 6; Def.'s Ex. 4.)

On November 2, 1987, shortly after her termination, plaintiff filed a charge of age discrimination with the West

Virginia Human Rights Commission. (Def.'s Ex. 2, King Dep. Ex. 8.) On April 5, 1988, the Commission made a determination of "No Probable Cause," and advised plaintiff of her right to appeal. (Def.'s Ex. 2, King Dep. Ex. 9.) On September 15, 1994, another determination of "No Probable Cause" was issued. (Def.'s Ex. 2, King Dep. Ex. 10.) By letter dated September 22, 1994, plaintiff sought administrative review. (Def.'s Ex. 2, King Dep. Ex. 11.) Administrative review was conducted and recommendation was made that the no probable cause finding be upheld. (Def.'s Ex. 2, King Dep. Ex. 12.) By letter dated January 15, 1995, plaintiff was informed of that determination and was also provided with a notice of right to sue and a notice of right to appeal by petitioning for court review of the order. (Def.'s Ex. 2, King Dep. Ex. 13.) At some point after her termination, plaintiff also sought and received disability benefits from the Social Security Administration. (King. Dep. at 11-13.)

This suit was commenced in the Circuit Court of Kanawha County, West Virginia, on March 9, 1995, more than seven years after plaintiff's termination but less than two months after plaintiff received a notice of right to sue on her age discrimination claim. The case was removed to this court on April 5, 1995. Thereafter, on January 12, 1996, plaintiff was granted leave to file an amended complaint to add a cause of action based on ERISA. The amended complaint contains four counts. Count I

alleges employment discrimination on the basis of age in contravention of West Virginia Code, section 5-11-9. Count II is a claim of wrongful discharge in breach of "written and/or oral contracts" in which defendant "covenanted expressly and implicitly to deal with [plaintiff] fairly and in good faith and to provide permanent employment terminable only for just cause." (Compl. ¶ 28.) Count III asserts the intentional infliction of emotional ham in connection with plaintiff's termination. In Count IV, plaintiff contends that defendant violated sections 502(a)(1)(B) and 502(c) of ERISA by discharging her for the purpose of interfering with her attainment of rights under an employee welfare benefit plan.

With respect to Count I, defendant asserts in its motion for summary judgment that plaintiff has failed to establish a prima facie case of age discrimination because she cannot show that but for her age, she would not have been terminated. As to Counts II, III and IV, defendant maintains that plaintiff has failed to establish claims for wrongful discharge, intentional infliction of emotional distress, and violations of ERISA. Moreover, says defendant, as to the claims made in Counts II, III and IV, they are barred by the applicable statutes of limitations. Defendant further contends that the doctrine of judicial estoppel precludes plaintiff from seeking wage loss damages for

the period of time that she has been paid Social Security disability benefits.

II.

A. Statutes of Limitations.

1. Count I Age Discrimination.

Defendant concedes that the plaintiff's Count I age discrimination claim was brought timely, the limitations period having been tolled during the period of time that plaintiff was proceeding before the West Virginia Human Rights Commission on that claim. See Conaway v. Eastern Associated Coal, 358 S.E.2d 423, 427 (W. Va. 1986). However, contrary to plaintiff's assertion, the statute of limitations was not tolled on her other claims. Id. (proceedings before Human Rights Commission does not toll the statute of limitations on other causes of action based on plaintiff's discharge).

2. Count II Wrongful Discharge.

In her summary judgment materials, plaintiff recasts her Count II wrongful discharge claim as being an age discrimination claim under the West Virginia Human Rights Act. (See Pl.'s

Response at 36-37.) Thus, to the extent that the Count II wrongful discharge claim is subsumed by the Count I age discrimination claim, it survives the statute of limitations challenge. However, insofar as Count II is characterized as a claim for wrongful discharge, it is barred by a two-year statute of limitations period. Stanley v. Sewell Coal Co., 285 S.E.2d 679, 683 (W. Va. 1981). To the extent that it is viewed as a claim for breach of contract, there is no showing of an express contract of emplo~rment and the statute of limitations on the breach of an implied contract is five years. W. Va. Code § 55-2-6. Count II is accordingly barred by the statute of limitations except insofar as it is recast and subsumed by plaintiff's Count I age discrimination claim.

3. Count III Intentional Infliction of Emotional Distress.

The statute of limitations for an intentional infliction of emotional distress claim is two years. Courtney v. Courtney, 437 S.E.2d 436, 442-43 (W. Va. 1993). Plaintiff's contention that her claim for intentional infliction of emotional distress is a continuing tort and that the harm continued through the December 1994 administrative review of her Human Rights age discrimination claim is not supportable. The Count III cause of action for intentional infliction of emotional distress accrued

at the time of discharge and is barred by the applicable statute of limitations.

4. Count IV ERISA Violation.

In Count IV, plaintiff contends that defendant discharged her in order to prevent her attainment of full benefits due under an employee welfare benefit plan in violation of sections 502(a)(1)(B) and 502(c) of ERISA. Section 502(a)(1)(B) provides for a cause of action to recover benefits due under an employee welfare benefit plan. 29 U.S.C.A. § 1132(a)(1)(B). Section 502(c), 29 U.S.C.A. § 1132(c), governs the refusal of a plan administrator to supply requested information. Neither section fits the conduct alleged by plaintiff. The court accordingly treats plaintiff's Count IV ERISA claim as being brought under section 501, 29 U.S.C.A. § 1140, which provides, inter alia, that it shall be unlawful to discharge an employee for the purpose of interfering with the attainment of rights due under an employee welfare benefit plan protected by ERISA.

Congress did not provide a statute of limitations for claims founded on section 501 of ERISA. Consequently, it is appropriate for the court to apply the statute of limitations of the most closely analogous state cause of action. E.g., Teumer v. General Motors Corp., 34 F.3d 542, 546-47 (7th Cir. 1994).

Defendant contends that the most closely analogous state cause of action is West Virginia's two year statute of limitations for retaliatory discharge. Plaintiff takes the position that the appropriate borrowing statute is West Virginia's statute of limitations for fraud and that her Count IV cause of action did not accrue until September 1994, at the earliest, when she discovered the full extent of her loss of benefits.

The Court of Appeals for the Fourth Circuit has not addressed the question of what statute of limitations applies to a section 501 claim. Most circuit courts of appeal addressing the issue have found it appropriate to apply the statute of limitations for a state law cause of action for retaliatory/wrongful discharge, Teumer, 34 F.3d at 549-50; Byrd v. MacPapers, Inc., 961 F.2d 157, 159 (11th Cir. 1992); Hinton v. Pacific Enterprises, 5 F.3d 391, 394 (9th Cir. 1993), cert. denied, 114 S. Ct. 1833 (1994); or employment discrimination, Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1205 (10th Cir.); Gavalik v. Continental Can Co., 812 F.2d 834, 843 (3d Cir.), cert. denied, 484 U.S. 979 (1987); see also McClure v. Zoecon, Inc., 936 F.2d 777, 778-79 (5th Cir. 1991) (applying single statute of limitations for employment discrimination and wrongful discharge). Contra, Heideman v. PFL, Inc., 904 F.2d 1262, 1267 (8th Cir. 1990), cert. denied, 498 U.S. 1026 (1991)

(applying contract statute of limitations); Clark v. Coats & Clark, Inc.,, 865 F.2d 1237, 1242 (11th Cir. 1989) (applying statute of limitations for statutory rights and recovery of wages).

Plaintiff has cited no authority for the proposition that fraud is the state-law cause of action most closely analogous to her section 510 claim and the weight of authority supports application of the statute of limitations for retaliatory/wrongful discharge. On the basis of the weight of authority, the court concludes that West Virginia's two-year statute of limitations for retaliatory discharge, Stanley v. Sewell Coal Co., 285 S.E.2d 679, 683 (W. Va. 1981), should be applied to plaintiff's section 510 claim and that it is, accordingly, barred.

B. Age Discrimination.

Under section 5-11-9 of the West Virginia Human Rights Act, plaintiff must first make a prima facie case of employment discrimination by proving that:

(1) Plaintiff is a member of a protected class;

(2) The employer made an adverse decision concerning plaintiff; and

(3) But for the plaintiff's protected status, the adverse decision would not have been made.

Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423, 429 (W. Va. 1986).

To prove the third prong of the test, plaintiff must make some showing that "would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion." Id. at 429-30. In the absence of an admission of the employer, the evidence could come in the form of a showing of unequal or disparate treatment, the elimination of apparent legitimate reasons for the decision, or, in a large operation, statistical evidence showing that members of the protected class received substantially worse treatment than others. Id. at 430.

If the plaintiff makes a prima facie showing, the burden shifts to the employer to show some nondiscriminatory reason for the decision. Id. Once such a showing is made, the plaintiff has the opportunity to rebut the employer's evidence with a showing that the stated reason was merely pretextual and that discriminatory motive was the true reason for its actions. Id.

Here, it is conceded that plaintiff can prove the first two requirements of her prima facie case. As to the remaining requirement, plaintiff contends that there was a long-standing, albeit unwritten, policy that employees had a five to seven minute grace period within which to sign in and out. (Pl.s Dep. at 37-39.) Her testimony is supported by the affidavit of Harry B. Roberts, a co-worker, who avers that he personally observed other employees sign out and leave work five to ten minutes earlier than their scheduled quitting times and that their action was in accordance with a long-standing policy and practice which permitted a grace period for arrival and departure times. (Pl.'s Ex. 5, Roberts Aff. ¶ 2.) King has thus come forward with evidence which is contrary to the testimony of Arbogast to the effect that every other employee who Committed the offense of falsifying time cards was likewise discharged in accordance with the written handbook policy.

Inasmuch as there is evidence of a grace period which contradicts defendant's evidence of strict adherence to a no falsification policy and which would explain plaintiff's conduct in signing out early on August 27, 1987, there is evidence which tends to eliminate defendant's apparent legitimate reason for discharging plaintiff and to render pretextual its proffered nondiscriminatory reason for its decision. Thus, it cannot be said that plaintiff cannot prove a prima facie case of age

discrimination or that she cannot demonstrate the pretextual nature of defendant's stated nondiscriminatory reason for her discharge.

Defendant's motion for summary judgment on plaintiff's Count I age discrimination claim must be denied.

C. Judicial Estoppel.

Plaintiff testified that she is not now physically able to work and has not been physically able to work since "about" 1987, after her discharge by the defendant. (King. Dep. at 10-11.) She also testified that she receives Social Security disability payments. (King Dep. at 12.) On the basis of that testimony, defendant contends that plaintiff is judicially estopped from claiming wage loss damages in this action for the period of time that she received Social Security disability benefits.

The same issue has more recently been raised by the defendant in a motion in limine filed on August 9, 1996. It is noted that the motion in limine is accompanied by documentation, not earlier provided, in the form of a Social Security disability benefits award letter, which will be helpful to the court in deciding the judicial estoppel issue. It is further noted that the Fourth Circuit Court of Appeals has very recently addressed

its formulation of the doctrine of judicial estoppel in Lowery v. Stovall, to be published at ___ F.3d. ___, No. 95-1729 (4th Cir. Aug. 6, 1996).

Inasmuch as there is supplemental factual information and legal authority that should be considered by the court in ruling on the judicial estoppel issue, the court deems the matter more appropriately addressed in the context of the motion in limine filed by defendant on August 9, 1996. Insofar as defendant seeks partial summary judgment on the ground of judicial estoppel, the motion will be denied without prejudice to development of the matter in the context of the pending motion in limine.

III.

For the reasons stated, it is **ORDERED** that:

1. The motion of defendant Herbert J. Thomas Memorial Hospital Association for summary judgment be, and it hereby is, granted insofar as it is directed to plaintiff's Count II claim for wrongful discharge, her Count III claim for intentional infliction of emotional distress, and her Count IV claim for violation of ERISA.

2. The motion of defendant Herbert J. Thomas Memorial Hospital Association for summary judgment be, and it hereby is, denied insofar as it is directed to plaintiff's Count I age discrimination claim.

3. Insofar as the motion of defendant Herbert J. Thomas Memorial Hospital Association for summary judgment is based on the doctrine of judicial estoppel, the motion be, and it hereby is, denied without prejudice to development of the issue in the context of defendant's August 9, 1996, motion in limine based on that same argument, a briefing schedule for which will be separately set by the court.

The Clerk is directed to forward copies of this order to all counsel of record.

DATED: August 22, 1996

/s/_____
JOHN T. COPENHAVER, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

KERMIE M. KING,

Plaintiff

V. Civil Action No. 2:95-0252

HERBERT J. THOMAS MEMORIAL
HOSPITAL ASSOCIATION, a
non-profit West Virginia corporation,

Defendant

MEMORANDUM ORDER

By order entered on August 22, 1996, the court, inter alia, granted summary judgment in favor of the defendant on all of plaintiff's claims except for the Count I age discrimination claim brought under the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1 through 5-11-19. Summary judgment on that claim was denied without prejudice to further development of defendant's judicial estoppel argument in the context of defendant's motion in limine, filed on August 9, 1996,[1] and after giving the parties further opportunity to brief the issue.

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[1]Defendant's August 9, 1996, motion in limine sought to invoke the doctrine of judicial estoppel to preclude plaintiff from offering evidence of economic loss after September 2, 1987, the date on which she was found to be totally disabled for the purpose of receiving social security disability benefits.

Thereafter, on August 23, 1996, defendant filed a document captioned "DEFENDANT HERBERT J. THOMAS MEMORIAL HOSPITAL ASSOCIATION'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE EVIDENCE OF DAMAGES AND MOTION FOR SUMMARY JUDGMENT." In that document, defendant asserted that the doctrine of judicial estoppel also bars plaintiff from pursuing her age discrimination claim and asked, inter alia, that the court grant judgment in its favor on the age discrimination claim on the basis of its judicial estoppel argument. (Def.'s Supp. Mem. & Mot. Summ. J. at 1, 8.) In response, plaintiff contends in the alternative that defendant's August 23, 1996, submission is either an untimely motion for summary judgment or a motion for reconsideration. She asks the court to .strike the "untimely motion for summary judgment," or to deny it. (Pl.s' Resp. at 4, 15.)

To the extent that plaintiff seeks to strike the supplemental filing as an untimely motion for summary judgment, her position is not well taken inasmuch as the denial of summary judgment on the Count I claim on the ground of judicial estoppel was without prejudice. The parties having treated defendant's submission of August 23, 1996, as one seeking summary judgment, the court accordingly turns to the merits of defendant's contention that the doctrine of judicial estoppel entitles it to

summary judgment in its favor on plaintiff's Count I age discrimination claim.

In that regard, there is no dispute but that plaintiff was terminated from employment on or about September 9, 1987; that she was notified on December 12, 1988, that she was eligible for social security disability benefits as of September 2, 1987, one week before her discharge; and that she continues to date to receive those benefits. Inasmuch as plaintiff succeeded in persuading the Social Security Administration that she was unable to work at the time of her discharge, defendant'contends that she is estopped from asserting a contrary position in this action. Plaintiff counters, without evidentiary support, that the doctrine of judicial estoppel is not applicable because the favorable social security decision rested on her advanced age and inability to find new employment,' not on her inability to work. She also asserts, through the argument of counsel, that her receipt of unemployment benefits and her efforts to obtain new employment after her discharge at the very least create an issue of fact about whether, at the time of her termination, she was able to perform her duties.

I ·

The doctrine of judicial estoppel is designed to protect the integrity of the judicial process by "prevent[ing] a

party from playing fast and loose with the courts." Lowery v. Stovall, 92 F.3d 219, 223 & n.3 (4th Cir. 1996) (quoting John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 28-29 (4th Cir. 1995)). The doctrine thus "precludes a part from adopting a position that is inconsistent with a stance taken in prior litigation." Id.

Judicial estoppel, as formulated by the Fourth Circuit Court of Appeals, is to be applied with caution and requires a finding that three elements have been met. Id. at 223-24. First, the party against whom the doctrine is to be applied must be asserting a position that is inconsistent with a position taken in prior litigation,[2] and the "position sought to be estopped must be one of fact rather than law or legal theory." Id. at 224 (citations omitted). The second element is that "the prior inconsistent position must have been accepted," id. (citing Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214, 1218 (6th Cir. 1990); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982)); that is, the first tribunal must have adopted the position urged as part of a final disposition, id. at 224-25 (citing

[2]Administrative and quasi-judicial proceedings such as those conducted before the Social Security Administration are prior litigation for purposes of judicial estoppel. Simo v. Home Health & Hospice Care, 906 F. Supp. 714, 718 (D.N.H. 1995); Muellner v. Mars, Inc., 714 F. Supp. 351, 356-60 (N.D. Ill. 1989); see DeGuiseppe v. Village of Bellwood, 68 F.3d 187, 191 (7th Cir. 1995); UNUM Corp. v. United States, 886 F. Supp. 150, 158 (D. Me. 1995).

Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 n.5 (6th Cir. 1982)).

The third and determinative element is a finding that the party sought to be estopped "'intentionally mislead the court to gain unfair advantage.'" Id. (quoting Tenneco Chems., Inc. v. William T. Burnett & Co., 691 F.2d 658, 665 (4th Cir. 1982)). Consequently, judicial estoppel does not apply when the prior position was "based on inadvertence or mistake." Id. (quoting Faggert & Frieden, 65 F.3d at 29). However, when it is apparent that a party is "'blowing hot and cold as the occasion demands' or wanting 'to have [his] cake and eat it too,'" one may conclude that he is intentionally attempting to mislead the court and gain an unfair advantage. Id. at 225. He may be estopped from doing so inasmuch as the law need not tolerate a party swearing to both the truth and the untruth of the same matter. Id. (citing People v. Goestenkors, 662 N.E.2d 574, 577 (Ill. App. Ct. 1996).

Although the Fourth Circuit Court of Appeals has not had occasion to address the applicability of the doctrine of judicial estoppel under analogous circumstances, a number of courts in other jurisdictions have applied the doctrine and estopped a plaintiff from pursuing an. employment discrimination claim when there has been a prior determination of inability to perform necessary job functions at the time employment ceased. McNemar v. Disney Store, Inc., 91 F.3d 610, 616-19 (3d Cir. 1996)

(in light of sworn statements in applications for state and social security disability benefits of total and permanent disability predating his termination, plaintiff was estopped in claims under the Americans with Disabilities Act (ADA) and a similar New Jersey Law Against Discrimination from asserting that he was able to do his job at the time of discharge); Griffith v. Wal-Mart Stores, Inc., 930 F. Supp. 1167, 1173-74 (E.D. Ky. 1996) (in light of plaintiff's representations of total disability in application for and receipt of social security disability benefits, he was estopped in ADA claim from asserting that he was able to perform the essential functions of his job at the time of discharge); Garcia-Paz v. Swift Textiles, Inc., 873 F. Supp..547, 554-56 (D. Kan. 1995) (plaintiff judicially estopped from pursuing claim underADA by virtue of statements in connection with obtaining long-term disability insurance and social security disability benefits to effect that she was totally disabled from performing her job duties on the date of her termination); Muellner v. Mars, Inc., 714 F. Supp. 351, 355-60 (N.D. Ill. 1989) (plaintiff's successful representation of total disability to the Social Security Administration and her continuing receipt of disability benefits estopped her from asserting under her retaliatory discharge claim that she was capable of performing the duties of her job); see also Cline v. Western Horseman, Inc., 922 F. Supp. 442, (D. Colo. 1996) (as a matter of law, plaintiff is estopped from claiming under ADA that she was able to perform the

essential functions of her job while at the same time receiving social security disability benefits and, as a matter of fact, her receipt of disability benefits precludes a finding that there is a genuine issue of fact as to whether she could perform the essential functions of her job at the time of her discharge), cf. DeGuiseppe v. Village of Bellwood, 68 F.3d 187, 191 (7th Cir. 1995) (inasmuch as he testified before the pension board that he was disabled and submitted supporting reports from two physicians, plaintiff was estopped in retaliatory discharge action from asserting that he was not disabled).

Other courts reach the same result without invoking estoppel principles. E.g., Kennedy v. Applause, Inc., 90 F.3d 1477 (9th Cir. 1996) (inasmuch as plaintiff represented on state disability benefit and Social Security Administration claim forms that she was "completely disabled for all work-related purposes," there was no genuine issue that she could perform her job, an essential element of her claim under the ADA); August v. Offices Unlimited, Inc., 981 F.2d 576, 580-84 (1st Cir. 1992) (plaintiff who applied for and received total disability insurancebenefits could not meet his burden of demonstrating under the ADA that he could have performed his job if his handicap had been accommodated); Hatfield v. Quantum Chem. Corp., 920 F. Supp. 108, 110-11 (S.D. Tex. 1996) (plaintiff's representation of total disability in application for and receipt of insurance and social security

disability benefits sufficient for a finding that he was unable to perform the essential functions of his job and thus could not prevail on his ADA claim); Smith v. Midland Brake, Inc., 911 F. Supp. 1351, 1356-63 (D. Kan. 1995) (in light of plaintiff's representation of total disability in application for and receipt of social security disability benefits, no reasonable jury could find in his favor on employment discrimination and retaliatory discharge claims which required a showing of ability to perform his job and, thus, summary judgment in favor of the defendant was appropriate); Reigel v Kaiser Foundation Health Plan of N.C., 859 F. Supp. 963, 967-70 (E.D.N.C. 1994) (in light of evidence of plaintiff's representations of total and permanent disability in applications for total disability benefits, she failed to demonstrate ability to perform the essential functions of her job, an essential element of her ADA claim). But cf. Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (a Social Security Administration finding of disability is not necessarily inconsistent with an asserted ability to do one's job where it is shown that the award was based on a "finding that the claimant meets the criteria for a listed disability without inquiry into his ability to find work within the economy").

II.

For social security disability purposes, "disability" is defined as:

> [T]he inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy. To determine whether you are able to do any other work, we consider your residual functional capacity and your age, education, and work experience.

20 C.F.R. § 404.1505. Regulations describing what ~s necessary to show an impairment provide:

> If you are not doing substantial gainful activity, we always look first at your physical or mental impairment(s) to determine whether you are disabled or blind. Your impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by your statement of symptoms ....

20 C.F.R. § 404.1508.

Applying those regulations, the Social Security Administration advised plaintiff in a notice of award dated December 12, 1988, that she was entitled to benefits and that it was determined that she "became disabled on 9/02/87," (Def.'s Mot. Summ. J. Ex. 2), one week prior to her discharge by defendant. The notice advises plaintiff that her case will be reviewed in approximately three years inasmuch as "[t]he doctors and other trained personnel who decided that you are disabled believe that your health may improve." (Id.) The notice further states that "[t]he decisions we made on your claim are based on information you gave us."

On the basis of the information contained in the notice of award, the only reasonable inference is that plaintiff not only made the representation that she had a severe impairment that made her unable to do her previous work as of September 2, 1987, but that she also submitted medical evidence in support of that representation. Indeed, plaintiff has come forward with no evidence to support the unsubstantiated argument of counsel that the finding of disability was based on a consideration of plaintiff's inability to do other work based on such factors as her age. The court accordingly concludes that plaintiff successfully represented to the Social Security Administration that as of September 2, 1987, she was disabled and unable to perform her previous work.

In determining whether plaintiff's position before the Social Security Administration is inconsistent with a position necessarily taken in this action, it is seen that in order to prevail on her age discrimination claim under the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1 through 5-11-19, plaintiff must prove that at the time of defendant's allegedly discriminatory action (her discharge), she was "able and competent to perform the services required" of her employment. W. Va. Code § 5-11-9(1). She cannot make that showing without contradicting the position she successfully asserted in receiving social security disability benefits. The inconsistent position is one of fact (inability versus ability to perform her duties at the hospital) and it was adopted by the Social Security Administration in making a final determination on plaintiff's eligibility for benefits and in setting September 2, 1987, as the date on which she became disabled. The first two elements of the doctrine of judicial estoppel are satisfied.

As to the third element, there is no basis for finding that plaintiff's prior representation of disability prior to September 9, 1987, was based on inadvertence or mistake. Rather, the circumstances of this case strongly suggest that plaintiff is merely "'blowing hot and cold as the occasion demands." Having persuaded the Social Security Administration that she has been unable since September 2, 1987, to perform her duties at the

hospital, she now seeks the opportunity to persuade the trier of fact in this action that she was "able and competent to perform" those services on September 9, 1987. As the Fourth Circuit Court of Appeals noted, the law need not tolerate a party "wanting to 'have [his] cake and eat it too.'" Lowery, 92 F.3d at 225. The court is satisfied that plaintiff's allegation here that she was able to perform her duties at the time of her discharge is nothing more than an intentional intent to mislead the court to gain an unfair advantage in this litigation. The third and determinative element required for judicial estoppel is met.

Inasmuch as the elements necessary for application of the doctrine of judicial estoppel are present in this action, and consistent with the holdings of the majority of courts applying the doctrine in analogous situations, the court finds that plaintiff is estopped from representing to this court that she was able and competent to perform the services required of her by the defendant at the time of her discharge on September 9, 1987. She is accordingly unable to establish an essential element of her Count I age discrimination claim under the West Virginia Human Rights Act. Defendant is thus entitled to summary judgment on the remaining Count I age discrimination claim.

III.

For the reasons stated, it is **ORDERED** that defendant's motion for summary judgment on plaintiff's Count I age discrimination claim be, and it hereby is, granted.

The Clerk is directed to forward copies of this order to all counsel of record.

DATED: December 11, 1996

/s/ John T. Copenhaver, Jr.
JOHN T. COPENHAVER, JR.
United States District Judge